Filed 4/3/15 In re Miles B. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re MILES B., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. MILES B., Defendant and Appellant.	F070052 (Super. Ct. Nos. 11CEJ600346-3V & 11CEJ600346-4) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Gary R. Orozco, Judge.

Karriem Baker, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Gomes, J. and Peña, J.

Appellant Miles B. was readjudged a ward of the court (Welf. & Inst. Code, § 602)[1] after the court found true allegations charging him with brandishing an imitation firearm (Pen. Code, § 417.4), a misdemeanor, and he admitted allegations that he violated his probation.

On appeal, Miles contends: 1) the court acted without jurisdiction when it modified his commitment; 2) the court erred in calculating his maximum term of physical confinement (MTPC); and 3) the court erred in its award of predisposition custody credit. We find merit to Miles's second and third contentions and modify the judgment accordingly. In all other respects, we affirm.

FACTS

On May 28, 2014, at approximately 7:53 a.m., a Richmond police officer arrested Miles at gunpoint after seeing him point a starter pistol that appeared to be a firearm at the rear of an AC Transit bus. During an interview at the police station, Miles stated that he purchased the pistol in order to frighten some people who had been harassing him. Miles was on probation when he was arrested in the instant matter.

On May 21, 2014, the Contra Costa County Probation Department filed a notice of probation violation hearing (§ 777) alleging that Miles violated his probation by his failure to attend school and by his failure to obey the directives of his probation officer.

On May 29, 2014, the district attorney filed a supplemental petition (§ 602), charging Miles with brandishing an imitation firearm (Pen. Code, § 417.4), a misdemeanor.

At a jurisdictional hearing on June 11, 2014, the court sustained the brandishing charge and Miles admitted the charged violation of probation.

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

On June 23, 2014, the Fresno County Superior Court accepted the transfer of Miles's case from Contra Costa County.

At Miles's disposition hearing on July 8, 2014, the probation department recommended that Miles be ordered to serve 180 days in juvenile hall.

The court agreed with the prosecutor and stated that as of that morning, the 30 beds at the New Horizons Program were full and that it was inclined to order Miles committed there as soon as a bed became available.

After further discussion, the court noted that even though the current charge was only a misdemeanor, it was just the "tip of an iceberg" and that was why it thought that the New Horizons Program was "the best and last attempt" the court could make to try to help Miles. The court then asked the probation officer whether Miles would be placed on a waiting list if the court ordered him committed to the New Horizons Program or what would be the best way to get him into the program. The officer responded that New Horizons did not like creating waiting lists and he suggested that the court set a review hearing and check with New Horizons in two weeks. After further discussion, the court stated that it did not want to tie its hands in the event it encountered someone who needed the treatment more than Miles, so it would set a review hearing for two weeks instead and reserved the right to place him in that program.

The probation department cautioned the court that if it committed Miles that day and Miles eventually got a bed in the program, it would affect his 365-day commitment there, i.e., it would reduce the days he was actually committed there.

Defense counsel then suggested the following: Miles could waive time for two or three weeks and, when they came back, if Miles did well in juvenile hall, he would get the 180-day commitment to the hall instead. However, Miles advised defense counsel that he was not agreeable to that and wanted to be "sentenced." Nevertheless, defense counsel noted that the court had 10 working days to trail the disposition hearing and he stated that he would not object to that.

After a pause in the proceedings, the court, in pertinent part, extended Miles's probation through July 8, 2015, and stated:

> "The court has noted here on the record it would be the Court's primary objective to commit the minor to the New Horizons Program here at the JJC [Juvenile Justice Campus], however, there's no bed space available. But in the Court's thinking, that should a bed space open up tomorrow, the next day, a few days from now—what is in the best interests of the minor is not, … based on a crapshoot, it's based on making best efforts to find him the best program, even if he falls [short of attending the program 365 days], be it three days, four days, a week. … 365 days is not some magic elixir that represents that that is the perfect program of 365 days. So the Court says that [it is] reserving the right to commit him to that program, and *for the time being* will commit him to the [JJC] for a period of 180 days.
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> "The director is authorized to release the minor on furlough at such time as he's deemed eligible. [¶] … [¶] And I'll set the matter for a review next week to determine if there's an open bed space in New Horizons …." (Italics added.)

The court set the review hearing for July 14, 2014, to check on the availability of a bed at the New Horizons Program. On that date, the probation department informed the court that a bed was still not available in the New Horizons Program but that one should be available there around July 23, 2014. After defense counsel objected "to any modification on the 180 [days at the JJC]," the court responded:

> "[The] Court's going to *order that the minor is to participate in the New Horizons* [*P*]*rogram*, anticipating bed space will become available on or about the 23rd of July, 2014. And as I said at the outset, his initial disposition, the Court's primary objective is to commit the minor to the New Horizons [P]rogram. I imposed the 180 days until today's date *if there was no change in circumstances*. But given that representation by probation, understanding I'm not going to hold him to it a hundred percent, what I'll do is set this for a review on the—a nonappearance review on the 24th of July 2014 at 8:00 a.m. And then *if he's not in the program then*, I'll—and there's no bed space available, then I'll put it on calendar and order his appearance at the next—I'll set one more hearing date thereafter, because I'm not going to give him any additional time other than to

participate in the New Horizons [P]rogram, because I'm not going to make him wait any longer than that."[2] (Italics added.)

On July 24, 2014, the probation officer informed the court that Miles had been moved to the New Horizons Program the day before.

The court responded:

"So that will be the Court's order, then. He's to remain in the New Horizons [P]rogram within the allowable time that the Court gave him. So even if he has to be released having served his 365[days], … he got in there … two weeks later, so minus two weeks."

The court then committed Miles to the New Horizons Program for 349 days (365 days less the 16 days he had already missed being in the program since the date of his disposition hearing). In doing so, the court stated:

"And this is just basically cleanup because [the] Court had indicated it would do this if there was bed space for him and if he got in the program by the time we met today. If it hadn't occurred, then the Court was going to leave the prior orders in place with regard to anything we just changed.…"

DISCUSSION

Miles relies on *In re Eugene R.* (1980) 107 Cal.App.3d 605 (*Eugene R.*) to contend the court lacked jurisdiction to sua sponte modify its disposition orders of July 8, 2014, on July 14, 2014, and again on July 24, 2014. Miles further contends the court denied him his constitutional right to due process by modifying his commitment without complying with certain procedural requirements for doing so. We will reject these contentions.

Section 737 provides:

"(a) Whenever a person has been adjudged a ward of the juvenile court and has been committed or otherwise disposed of as provided in this chapter for the care of wards of the juvenile court, the court may order that

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[2] The probation officer also advised the court that the New Horizons Program was now 18 months long and, if committed there, Miles's time would run from the date of his disposition, i.e., July 8, 2014. The court then increased Miles's probation an additional six months from the termination date of July 8, 2015, it had previously set, to January 8, 2016.

the ward be detained until the execution of the order of commitment or of other disposition.

"(b) In any case in which a minor or nonminor is detained for more than 15 days pending the execution of the order of commitment or of any other disposition, the court shall periodically review the case to determine whether the delay is reasonable. These periodic reviews shall occur at a hearing held at least every 15 days, commencing from the time the minor or nonminor was initially detained pending the execution of the order of commitment or of any other disposition.…"

It is clear from the court's remarks at the July 8, 14, and 24, 2014, hearings that at the July 8, 2014, disposition hearing, the court always intended to commit Miles to the New Horizons Program, but initially was unable to physically place him there because there was no room in the program. It is also clear from these remarks that at the July 8, 2014, hearing, the court in effect committed Miles to the JJC temporarily as authorized by section 737 pending placement in the New Horizons Program when space became available there. Thus, the court did not modify its disposition orders as Miles contends.

In any event, we disagree that the court could not modify its order committing Miles to the New Horizons Program.

Section 775 provides:

"Any order made by the court in the case of any person subject to its jurisdiction may at any time be changed, modified, or set aside, as the judge deems [fit] and proper, *subject to such procedural requirements as are imposed by this article*." (Italics added.)

Section 775 is contained in article 20 of the Welfare and Institutions Code. Section 776 is the only section in article 20 that appears to directly restrict the court's authority to sua sponte modify a disposition order it previously made. Section 776 provides:

"No order changing, modifying, or setting aside a previous order of the juvenile court shall be made either in chambers, or otherwise, unless prior notice of the application therefor has been given by the judge or the clerk of the court to the probation officer and prosecuting attorney and to

> the minor's counsel of record, or, if there is no counsel of record, to the minor and his parent or guardian."

Read in conjunction with section 775, this section indicates that the juvenile court may modify its orders at any time as long as it gives prior notice to the interested parties. Further, the court complied with section 776's notice requirement when it advised the parties and the probation officer at the hearing on July 8, 2014, and again at the hearing on July 14, 2014, that it intended to commit Miles to the New Horizons Program if a space became available.

Other sections in article 20 of the Welfare and Institutions Code also address modification of a court's order, but they do not expressly affect the court's authority under section 775 to modify its order sua sponte. For example, section 777 provides:

> "An order changing or modifying a previous order by removing a minor from the physical custody of a parent, guardian, relative, or friend and directing placement in a foster home, or commitment to a private institution or commitment to a county institution, or an order changing or modifying a previous order by directing commitment to the Youth Authority shall be made only after a noticed hearing.
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> "(a) The notice shall be made as follows:
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> "(1) By the probation officer where a minor has been declared a ward of the court or a probationer under Section 601 in the original matter and shall contain a concise statement of facts sufficient to support the conclusion that the minor has violated an order of the court.
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> "(2) By the probation officer or the prosecuting attorney if the minor is a court ward or probationer under Section 602 in the original matter and the notice alleges a violation of a condition of probation not amounting to a crime. The notice shall contain a concise statement of facts sufficient to support this conclusion."

Section 777 by its terms applies to the probation officer and the district attorney and, in the case of a section 602 ward, allows either one to petition the court to change or modify a previous court order by removing a minor from the physical custody of a parent or guardian and directing that he be placed in a foster home, etc. Further, to the extent

that this section limits the court's power to modify a prior commitment, by its terms it does not apply here because the court's alleged modification of a previous order here did not involve removing Miles from the custody of his parents or committing him to JJC.

Section 778 by its terms applies to a minor or "[a]ny parent or other person having an interest in a child" and it allows any of the designated persons "upon grounds of change of circumstance or new evidence, [to] petition the court in the same action in which the child was found to be a ward of the juvenile court for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." (Former § 778, now § 778, subd. (a)(1).) It does not, however, appear to place any restrictions on the court modifying a previous order.

Moreover, *Eugene R.*, *supra*, 107 Cal.App.3d 605 is not controlling. In *Eugene R.*, the trial court set the minor's MTPC to the California Youth Authority (currently known as the Division of Juvenile Justice (DJJ)) at three years 10 months, consisting of a two-year base term for an auto theft offense, a one-year term for a felony assault with a deadly weapon offense, a four-month term for a misdemeanor tampering with a vehicle offense, and three two-month terms for three misdemeanor theft offenses. After the order issued, the court on its own motion gave notice to the probation officer that it intended to hold a hearing to review the minor's "'maximum commitment and days in custody.'" (*Id.* at p. 611.)

In holding that the court lacked jurisdiction to modify the judgment, the *Eugene R.* court cited cases holding that in adult criminal cases, "where a defendant has commenced serving the sentence, the court has no jurisdiction to vacate or modify the sentence as pronounced and formally entered in the minutes in an attempt to revise its deliberately exercised judicial discretion unless the sentence was improper on its face" (*Eugene R.*, *supra*, 107 Cal.App.3d at p. 612). The court then expressed its reasoning for applying this rule to juvenile delinquency proceedings:

"The foregoing procedural rule should also apply to juvenile matters. Although denominated as civil in nature, the courts have long recognized and emphasized that original section 602 and supplementary juvenile proceedings are quasi-criminal in nature. Ramifications of a section 602 hearing include a possible finding that the alleged criminal conduct is true, resulting in a substantial loss of personal freedom. [Citations.] [Former] [r]ule 39 of the California Rules of Court**[3]** expressly provides for the application of the general rules relating to criminal appeals to all juvenile appeals.**[4]** The Judicial Council in its advisory committee comment accompanying [former] rule 39 explains that such application 'would better enable the appellate courts to implement the legislative policy that juvenile court matters be handled expeditiously at the appellate as well as at the trial court level [citations].'

"When we apply the jurisdictional rule in controversy to juvenile proceedings, the cited legislative policy is promoted and the criminal appellate rules are followed. To conclude otherwise and allow collateral modification based upon another judge's view of abuse of discretion would inevitably promote 'judge-shopping' and sanction delay." (*Eugene R., supra*, 107 Cal.App.3d at pp. 612–613, fn. 3 added, fn. 4 in original.)

The *Eugene R.* court rejected the Attorney General's argument that the juvenile court could modify the judgment pursuant to section 775 at any time that the court had continuing jurisdiction over the minor, stating:

"Granted the juvenile court has continuing jurisdiction over the minor; however, such jurisdiction must be properly activated by petition or application and cannot be exercised on the court's own motion without procedural statutory authority." (*Eugene R.*, *supra*, 107 Cal.App.3d at p. 613.)

The court then cited the language of section 775 and stated:

"Article 20, sections 775 through 779 read together, does not authorize the juvenile court to modify a previous order on its own motion. If such power was inherent or provided for by section 775, then the Judicial

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3 All further references to rules are to the California Rules of Court.

4 "[Former] [r]ule 39(a) provide[d] in pertinent part: 'The rules governing appeals from the superior court in criminal cases are applicable to all appeals from the juvenile court except where otherwise expressly provided by this rule, or where the application of a particular rule would be clearly impracticable or inappropriate.'"

> Council and the Supreme Court would not have enacted rule 1391(d)[5] … in the narrow manner written providing for the correction of only clerical errors in judgments, orders and the record by the court at any time on its own motion." (*Eugene R.*, *supra*, 107 Cal.App.3d 605, 613.)

However, juvenile delinquency proceedings and adult criminal proceedings serve different purposes.

> "The purpose of juvenile proceedings remains markedly different from that of adult proceedings. The state's purpose in juvenile proceedings is a rehabilitative one distinguishable from the criminal justice system for adults, which has a purely punitive purpose separate from its rehabilitative goals. [Citation.] The proceedings are intended to secure for the minor such care and guidance as will best serve the interests of the minor and the state and to impose upon the minor a sense of responsibility for his or her actions. The purpose of imprisonment pursuant to criminal law is punishment. [Citation.] While part of the juvenile justice system does include punishment in certain cases, it does not change the primary purpose of juvenile proceedings from that of preserving and promoting the welfare of the child. In juvenile law, '… the reference to punishment did not alter the overall rehabilitative aspect of the juvenile justice system.' [Citation.]" (*In re Myresheia W.* (1998) 61 Cal.App.4th 734, 740–741.)

In view of these differences, it does not follow that the rule prohibiting the court from modifying a criminal sentence that has commenced being served applies to juvenile proceedings simply because juvenile proceedings are quasi-criminal in nature and because a rule of court "expressly provide[d] for the application of general rules relating to criminal appeals to all juvenile appeals." (*Eugene R.*, *supra*, 107 Cal.App.3d at p. 612, fn. omitted.) Nor has Miles provided any compelling rationale why it should.

Nor do we find persuasive *Eugene R.*'s conclusion that section 775 does not authorize a court to sua sponte modify its order because the language in former

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5 Rule 1391(d) was repealed effective July 1, 1989, and subsequently readopted as rule 1430(f) effective January 1, 1991, and amended effective January 1, 2001. (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 115–116, fn. 20.) Effective January 1, 2007, rule 1430(f) was renumbered rule 5.560(f) and it provides "Clerical errors in judgments or other parts of the record may be corrected by the court at any time on the court's own motion or on motion of any party and may be entered nunc pro tunc."

rule 1391(d) (currently rule 5.560(f)) would not have been enacted in the "narrow manner written providing for the correction of only clerical errors in judgments …." (*Eugene R., supra,* 107 Cal.App.3d at p. 613.) This conclusion suggests that if the juvenile court had jurisdiction to modify its orders sua sponte, the rule would have been written to provide for such modifications. However, since the express language of section 775 already allowed the court to modify its orders with respect to a juvenile over which it had jurisdiction, it was unnecessary to include this provision in rule 5.560(f). Further, the correction of clerical errors is a ministerial task that does not require the exercise of discretion. Modifications in a juvenile court's orders that involve more than the correction of clerical error may, however, involve an exercise of discretion and thus require notice to the parties and the opportunity to be heard. This may explain why the court's power to correct these two different types of errors are not contained in the same rule or statute. In any event, it does not follow from rule 5.560(f) that section 775 does not mean what it says, that "[a]ny order made by the court in the case of any person subject to its jurisdiction may at any time be changed, modified, or set aside …." (§ 775.)

Additionally, we note that in *Nickolas F. v. Superior* Court, *supra*, 144 Cal.App.4th 92, the above holding of *Eugene R.* was disavowed by the court that originally issued it. (*Nickolas F. v. Superior Court, supra,* at pp. 115–116, fn. 20.) Accordingly, for all these reasons, we reject Miles's contention that section 775 did not authorize the court to modify his commitment to juvenile hall by committing him to the New Horizons Program.

Moreover, it follows from the foregoing discussion that the court did not deny Miles his constitutional right to due process when it committed him to the New Horizons Program.[6]

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6 Miles also contends that if he forfeited this constitutional challenge to the court modification of its disposition order, he was denied the effective assistance of counsel by his

Miles's MTPC

At Miles's disposition hearing, the court set Miles's MTPC for his felony grand theft and misdemeanor brandishing an imitation firearm offense at three years four months. Miles contends the court erred in calculating his MTPC. Respondent concedes and we agree.

When the juvenile court removes a minor from the custody of his or her parent or guardian, it is required to calculate the minor's MTPC. (Former § 726, subd. (c), now § 726, subd. (d).) Although in calculating Miles's MTPC the court correctly used a three-year term for Miles's felony grand theft offense from a prior petition (Pen. Code, §§ 487, 489 & 1170, subd. (h)(1); Welf. & Inst. Code, § 726, subd. (d)), it was required to use only one-third of the maximum term for his brandishing an imitation firearm offense. (*In re Fausto S.* (1985) 175 Cal.App.3d 909, 911–912.) Since brandishing an imitation firearm is punishable by a maximum penalty of six months (Pen. Code, §§ 417.4 & 19), the court should have used a two-month term for this offense, which would have resulted in a MTPC of only three years two months. Thus, the court erred when it set Miles's MTPC at three years four months.

Miles's Confinement Credit

Miles contends he is entitled to an additional 16 days of confinement credit for the time he spent in custody from the date of his disposition hearing through the date he was committed to the New Horizons Program. We find partial merit to this contention.

"[A] minor is entitled to credit against his or her maximum term of confinement for the time spent in custody before the disposition hearing. [Citations.] It is the juvenile court's duty to calculate the number of days earned, and the court may not delegate that duty. [Citations.]" (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.)

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attorney's failure to interject an appropriate objection that would have preserved this issue on appeal. This contention is moot in light of our conclusion that Miles was not denied his constitutional right to due process.

The juvenile court was also required to include in its award of custody credit all the days Miles was in a secure confinement prior to his commitment to the New Horizons Program. (*In re J.M.* (2009) 170 Cal.App.4th 1253, 1256.)

Miles spent 46 days in custody through the date of his disposition hearing on July 8, 2014. From that date until July 23, 2014, he spent an additional 15 days in custody in juvenile hall. Thus, Miles is entitled to an additional 15 days of custody credit, for a total of 61 days of such credit (46 days + 15 days = 61 days).

DISPOSITION

The judgment is modified to reduce Miles's MTPC from three years four months to three years two months and to increase his custody credit from 46 days to 61 days, as calculated above. In all other respects, the judgment is affirmed.